

responsibilities of a regulatory nature. Georgia in 1847 authorized telegraph companies to use public roads.<sup>52/</sup> Florida granted similar authorization in 1849 provided that the companies answer in damages to affected landowners.<sup>53/</sup> In the decades that followed, Alabama authorized use of public roads by telegraph companies (1855),<sup>54/</sup> Mississippi provided for general incorporation, use of public roads and compensation to private landowners (1857),<sup>55/</sup> Kansas Territory provided for

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<sup>52/</sup> Act of Dec. 27, 1847, Ga. Laws, p. 218. The power of eminent domain and the duty to serve with impartiality were included in some early specific incorporation laws. See, e.g., Act of Feb. 18, 1854, Ga. Laws, 1853-54, No. 338, p. 386; Act of Feb. 18, 1854, Ga. Laws, 1853-54, No. 339, p. 390. The latter enactment also included a provision for route exclusivity. See also Act of Aug. 26, 1872, Ga. Laws, c. 20, p. 78, and Act of Jan. 28, 1873, Ga. Laws, c. 85, p. 69, authorizing telegraph companies to use railroad rights-of-way. The power of eminent domain was granted by Act of Sept. 12, 1889, Ga. Laws, No. 276, p. 141. For subsequent regulatory legislation, see note 137 infra.

<sup>53/</sup> Act of Jan. 8, 1849, Fla. Laws, c. 246, p. 64. General incorporation of telegraph companies was authorized by Act of Dec. 27, 1856, Fla. Laws, c. 781, p. 12. Further legislation on telegraph rights-of-way was forthcoming in Act of Dec. 30, 1856, Fla. Laws, c. 782, p. 15; Act of Feb. 19, 1874, Fla. Laws, 1873, c. 1992, p. 59. Some early specific incorporation statutes included regulatory provisions. See, e.g., Act of Dec. 27, 1856, Fla. Laws, c. 783, p. 15 (duty to transmit with impartiality). For subsequent regulatory legislation see note 134 infra.

<sup>54/</sup> Act of Dec. 17, 1855, Ala. Laws, p. 6. The power of eminent domain was conferred in subsequent legislation. Act of Apr. 3, 1873, Ala. Laws, 1872, No. 86, p. 130. Some early specific incorporation enactments contained regulatory provisions. See, e.g., Act of Feb. 10, 1852, Ala. Laws, 1851-52, No. 177, p. 282 (duty to deliver telegrams and to maintain public office). For subsequent regulatory legislation see note 199 infra.

<sup>55/</sup> Miss. Rev. Code, ch. 35, § 1, art. 3, and § 9, art. 45-47 (1857). Substantially similar provisions were included

general incorporation and use of public roads (1859),<sup>56/</sup>  
 Minnesota authorized use of public roads (1860),<sup>57/</sup> Wyoming  
 Territory provided for general incorporation, eminent domain  
 and use of public roads (1869),<sup>58/</sup> Montana Territory (1872)<sup>59/</sup>  
 and Texas (1871)<sup>60/</sup> enacted similar legislation, and North

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as §§ 2397-2405 and 2430-32 of Miss. Rev. Code (1871). The latter revision required the Governor's approval for incorporation of telegraph companies (§ 2400). See also Act of Apr. 5, 1876, Miss. Laws, c. 135, p. 229, on eminent domain and use of public roads. For subsequent regulatory legislation see note 136 infra.

<sup>56/</sup> Act of Feb. 9, 1859, Kans. Terr. Laws, c. 36, p. 305, §§ 16-19; reenacted in Kansas Laws, 1862, c. 44, p. 360, and supplemented by Kansas Laws, 1862, c. 152, p. 767. See also Kans. Gen. Stat., 1868, c. 23, p. 190, §§ 5, 74-80. For subsequent regulatory legislation see note 144 infra.

<sup>57/</sup> Act of Feb. 3, 1860, Minn. Laws, 1859, c. 12, p. 105. In 1866, general incorporation of telegraph companies was authorized and the power of eminent domain was conferred. Minn. Gen. Stat., ch. 84, tit. 1, §§ 1-28 (1866). When railroads were authorized to operate telegraph systems in 1875, they were empowered to "charge a reasonable compensation for transmitting messages." Act of Mar. 5, 1875, Minn. Laws, c. 14, p. 50. Some early specific incorporation laws provided for exclusive routes. Act of Mar. 3, 1855, Minn. Laws, c. 22, p. 69; Act of July 22, 1857, Minn. Laws, c. 94, p. 332; Act of Feb. 24, 1865, Minn. Laws, c. 38, p. 82. For subsequent regulatory legislation see note 135 infra.

<sup>58/</sup> Act of Dec. 10, 1869, Wyom. Terr. Laws, §§ 38, 45, carried forward as ch. 34 of Wyom. Comp. Stat. (1870). For subsequent regulatory legislation see note 237 infra.

<sup>59/</sup> Act of Jan. 12, 1872, Mont. Terr. Laws, 1871, c. 18, p. 404, §§ 35, 42. See also Act of May 7, 1873, Mont. Terr. Laws, p. 93. For subsequent regulatory legislation see note 141 infra.

<sup>60/</sup> Act of Dec. 2, 1871, Texas Laws, c. 80, p. 66. Early specific incorporation laws sometimes included regulatory

[Footnote continued next page]

Carolina authorized use of public roads and conferred the power of eminent domain (1875).<sup>61/</sup> Regulatory legislation ultimately was adopted in all of these states but not within this time frame. Contemporaneous regulatory provisions often were included in specific incorporation laws.

In several additional states, regulatory legislation was delayed but regulatory provisions were enacted during this early period. Ohio in 1847 authorized use of public roads and provided for damages to adversely affected landowners; the next year incorporation of telegraph companies under a general statute was authorized.<sup>62/</sup> In 1865, Ohio enacted detailed regulatory provisions requiring telegraph companies to transmit messages from and for individuals and other telegraph companies; to forward telegrams on other lines when requested to do so; to inform customers of any delays in transmission; to transmit and deliver messages in order of receipt; and to make

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provisions. See, e.g., Act of Jan. 15, 1856, Texas Laws, 1855, c. 9, p. 10 (prohibition against discrimination). For subsequent regulatory legislation, see note 113 infra.

<sup>61/</sup> Act of Mar. 19, 1875, N.C. Laws, 1874, c. 203, p. 271. For subsequent regulatory legislation see note 139 infra.

<sup>62/</sup> Act of Feb. 8, 1847, 45 Ohio Laws 34; Act of Jan. 5, 1848, 46 Ohio Laws 25. See also Act of May 1, 1852, 50 Ohio Laws 274, §§ 44-48, largely codifying prior legislation.

deliveries of telegrams within the zones prescribed by the regulations of the company.<sup>63/</sup>

Tennessee provided in 1848 that lawful owners of any system of telegraphing had the right to use public roads and private lands provided that the system did not conflict with any private right secured by patent; the board of internal improvement was authorized to license a right-of-way if satisfied that there was no patent infringement.<sup>64/</sup> In 1858, Tennessee imposed a duty on telegraph companies to transmit all "messages, including those from other telegraph companies, . . . in the order of their delivery, correctly, and without unreasonable delay . . . ."<sup>65/</sup>

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<sup>63/</sup> Act of Mar. 31, 1865, 62 Ohio Laws 72. In 1867, Ohio established a commission of railroads and telegraphs and required telegraph companies to make annual reports. Act of Apr. 5, 1867, 64 Ohio Laws 111, as amended in minor respects by Act of Apr. 24, 1873, 70 Ohio Laws 155; Act of Apr. 25, 1873, 70 Ohio Laws 158; Act of May 5, 1873, 70 Ohio Laws 276.

<sup>64/</sup> Act of Jan. 14, 1848, Tenn. Laws, c. 83, p. 130, §§ 10, 11, supplemented by Act of Feb. 4, 1850, Tenn. Laws, 1849-50, c. 111, p. 303. Regulatory provisions were included in some specific acts of incorporation. See, e.g., Act of Jan. 24, 1848, Tenn. Laws, 1847, c. 218, p. 384, § 44 (rate restriction).

<sup>65/</sup> Tenn. Code §§ 1316-22 (1858). By Act of Feb. 26, 1869, Tenn. Laws, 1868-69, p.264, c. 53, § 21, telegraph companies were obliged to transmit messages for other telegraph companies "for the price customarily [charged] for the transmission of similar messages, . . . and in the same manner and with as little delay as if they were offered by the writer or maker thereof." See also Act of Mar. 23, 1875, Tenn. Laws, c. 142, p. 232, § 8.

Vermont in 1847 accorded telegraph companies the right to use public roads subject to local regulation, and in 1848 established procedures for assessing damages sustained by private landowners.<sup>66/</sup> In 1863, Vermont passed an "Act to Provide Against Extortion by Telegraph . . . Companies," requiring that the companies post schedules of rates in their offices and abide by such published rates.<sup>67/</sup>

Colorado, while still a territory, authorized telegraph companies to incorporate under a general statute, to use public roads, and to exercise the power of eminent domain (1862 and 1864).<sup>68/</sup> In 1876, telegraph companies were required to transmit messages in the order received and to transmit messages from other telegraph lines "in good faith and without partiality."<sup>69/</sup>

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<sup>66/</sup> Act of Oct. 27, 1847, Vt. Laws, No. 17, p.14; Act of Nov. 13, 1848, Vt. Laws, No. 31, p. 24. See also Act of Nov. 8, 1854, Vt. Laws, No. 33, p. 38.

<sup>67/</sup> Act of Nov. 11, 1863, Vt. Laws, No. 16, p. 21. By Act of Dec. 23, 1880, Vt. Laws, No. 53, p. 56, telegraph companies were required to forward messages over lines of other companies.

<sup>68/</sup> Act of Apr. 15, 1862, Colo. Terr. Laws, p. 44; Act of Aug. 11, 1864, Colo. Terr Laws, p. 49.

<sup>69/</sup> Colo. Gen. Laws, 1876, c. 19, §§ 289-92.

West Virginia conferred the power of eminent domain on telegraph companies in 1870<sup>70/</sup> and provided for their general incorporation in 73.<sup>71/</sup> In 1879, it was provided that such companies "shall be deemed public companies and common carriers."<sup>72/</sup>

In a few states, the order was reversed, with initial emphasis placed on the regulation of telegraph companies. Indiana in 1852 imposed a duty on telegraph companies to receive dispatches from individuals and other telegraph companies and, on payment or tender of the usual charge, to "transmit the same with impartiality and good faith, and in the order of time in which they were received." In addition, telegraph companies were to be liable for special damages for failure or negligence in operations and were required to deliver messages to any person within the town in which the station was located or within one mile of the station.<sup>73/</sup> Legislation in 1853 legalized defects in previously organized corporations,<sup>74/</sup> and in 1867 provision was made for the

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<sup>70/</sup> W. Va. Code ch. 54, § 2 (1870).

<sup>71/</sup> Act of Apr. 5, 1873, W.Va. Laws, 1872-1873, c. 107, p. 264.

<sup>72/</sup> Act of Mar. 6, 1879, W. Va. Laws, c. 39, p. 53.

<sup>73/</sup> Act of May 13, 1852, Ind. Rev. Stat. c. 107 (1852).

<sup>74/</sup> Act of Feb. 1, 1853, Ind. Laws, c. 111, p. 131.

incorporation of telegraph companies and for their exercise of the power of eminent domain.<sup>75/</sup>

In 1852, Maine enacted legislation narrowly restricting the liability of telegraph companies, but requiring a refund of the charge if a dispatch was improperly or unnecessarily delayed.<sup>76/</sup> Early specific incorporation laws provided for the use of public roads and required the transmission of messages from and for individuals and other telegraph lines "with impartiality and good faith."<sup>77/</sup> In 1867, provision was made for compensation to private landowners,<sup>78/</sup> and in 1868 telegraph companies were required "to transmit all dispatches in the order in which they are received."<sup>79/</sup>

Washington Territory in 1866 required that telegraph messages be transmitted in the order received, and imposed penalties for "unreasonably and willfully" refusing or

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<sup>75/</sup> Act of Mar. 11, 1867, Ind. Laws, c. 49, p. 110.

<sup>76/</sup> Act of Mar. 30, 1852, Me. Laws, c. 237, p. 236.

<sup>77/</sup> See, e.g., Act of Aug. 10, 1848, c. 164, p. 225 (Me. Private Laws); Act of Aug. 10, 1848, c. 169, p. 230 (Me. Private Laws); Act of Mar. 23, 1854, c. 256, p. 258 (Me. Private Laws).

<sup>78/</sup> Act of Jan. 28, 1867, Me. Laws, c. 65, p. 40.

<sup>79/</sup> Act of Feb. 5, 1868, Me. Laws, c. 140, p. 97.

neglecting to transmit or deliver telegraph messages or for postponing them out of turn.<sup>80/</sup> General legislation explicitly authorizing eminent domain and use of public roads did not follow until later.<sup>81/</sup>

In 1877, the Civil Code of the Dakota Territory set forth comprehensive provisions governing common carriers of messages, specifying a duty to serve, a prohibition on preferential treatment, a general standard of reasonable compensation, and restrictions on contracts limiting liability. As to telegraph companies in particular, the statute required the use of "utmost diligence" and the transmission of messages immediately if practicable, and otherwise generally in the order received.<sup>82/</sup> General laws granting the right to use public roads and to exercise the power of eminent domain were enacted later.<sup>83/</sup>

Toward the end of this early period, additional states enacted comprehensive legislation patterned after the

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<sup>80/</sup> Act of Jan. 24, 1866, Wash. Terr. Laws, 1865, p. 69.

<sup>81/</sup> Act of Feb. 1, 1888, Wash. Terr. Laws, 1887-88, c. 33, p. 65; Act of Mar. 28, 1890, Wash. Laws, p. 292.

<sup>82/</sup> Dakota Terr. Civil Code §§ 1253-62, 1285-87 (1877).

<sup>83/</sup> Act of Mar. 5, 1881, Dakota Terr. Laws, c. 132, p. 207 (public roads); Act of Mar. 13, 1885, Dakota Terr. Laws, c. 141, p. 208 (eminent domain).



early franchise models. Arkansas in 1861 authorized telegraph companies to use public roads, required that communications be transmitted in the order received, and required that telegraph companies with offices in the same locality transmit messages for one another in the order received.<sup>84/</sup> Oregon in 1862 authorized construction of telegraph lines on public roads and private property, established a general duty to transmit dispatches in the order received, and imposed a priority for messages received from other lines.<sup>85/</sup> Utah Territory in 1863 imposed a penalty for unreasonable and willful refusal or neglect to send or deliver any telegraph message or for postponing it out of order; transmission in the order received was required.<sup>86/</sup> The following year provision was made for the general incorporation of telegraph companies, use of public roads, and intrusions on private property.<sup>87/</sup> In 1866, Nevada provided for incorporation of telegraph companies, use of public roads, and exercise of the power of eminent domain; it

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<sup>84/</sup> Act of Jan. 21, 1861, Ark. Laws, 1860, No. 210, p. 387. In 1868, the regulatory provisions of the New York statutes of 1848 and 1850 were added. Act of July 16, 1868, No. 25, p. 81.

<sup>85/</sup> Act of Oct. 17, 1862, compiled at pp. 449-52, 773-76 of Ore. Gen. Laws (1874).

<sup>86/</sup> Act of Jan. 16, 1863, Utah Terr. Laws, 1862-63, p. 6.

<sup>87/</sup> Act of Jan. 14, 1864, Utah Terr. Laws, 1863-64, p. 15. See also Utah Rev. Stat §§ 3588, 4460, 4461 (1898).

also required impartial dispatch of telegraph messages, adherence to posted rates, and maintenance of telegraph lines in good condition.<sup>88/</sup> Arizona Territory in 1871 authorized telegraph companies to use public roads and required transmission of messages in the order received.<sup>89/</sup>

E. An Appraisal of the Early Telegraph Legislation

As might be anticipated, there was significant diversity in matters of detail in the early state legislation applicable to the telegraph industry. There were, however, a number of common features. Most of the states were interested in facilitating development of the new means of communication, and took affirmative measures to enable telegraph companies to use public streets, to condemn private property, and to adopt the corporate mode of doing business. At or about the same time, most states imposed obligations on telegraph companies to deal with customers and with other telegraph companies in a reasonable and nondiscriminatory manner. Such measures were appropriate as a means of preventing telegraph companies from

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<sup>88/</sup> Act of Feb. 9, 1866, Nev. Laws, p. 61. Earlier statutes had punished unreasonable and willful neglect or refusal to send or deliver telegrams, and willful postponement of telegrams out of order. Transmission in the order received was required. Act of Nov. 25, 1861, Nev. Terr. Laws, c.22, p. 46; Act of Feb. 26, 1864, Nev. Terr. Laws, c. 86, p. 125.

<sup>89/</sup> Ariz. Terr. Comp. Laws, c. 53, §§ 1, 2 (1871). See also Ariz. Terr. Penal Laws § 1010 (1887).

improperly exploiting monopoly positions, derived in part from patent rights and in part from use of the special privileges obtained under state legislation.

There were a few states -- such as Indiana -- that imposed obligations without concurrently providing special privileges. There were others -- somewhat more numerous -- that conferred special privileges without concurrently imposing obligations. These aberrations are more apparent than real. In many cases, complementary legislation was passed within a few years or complementary provisions were included in special legislation -- i.e., the power of eminent domain and use of public roads were conferred by general statute while the duty to serve was included in specific corporate charters, or the duty to serve was articulated in general legislation while the power of eminent domain and use of public roads were encompassed in corporate charters or other legislation. In the few instances where this did not occur, it is a fair conclusion that both rights and obligations were implicit in the apparently incomplete state legislation. As a practical matter telegraph lines could not be built without use of public thoroughfares and without impinging to some extent on private property interests. And, in accordance with legal doctrines prevailing at the time, use of public thoroughfares or the exercise of the power of eminent domain imposed upon a

telegraph company a duty to provide access to all members of the public on nondiscriminatory terms.<sup>90/</sup>

### III. THE TELEGRAPH IN CONGRESS, 1860 - 1888

In a series of enactments, Congress sought to facilitate the development of the telegraph industry, while at the same time curbing abuses of monopoly position. The legislative responses were two-pronged. First, there was an effort to achieve greater competition in the telegraph industry by encouraging additional lines. Second, in view of existing monopoly conditions, Congress imposed on telegraph companies obligations to provide access on reasonable and nondiscriminatory terms. The two efforts were complementary in part, since one of the means by which the telegraph monopoly was extended was by denying independent telegraph companies, operating over competitive segments, access to monopoly segments.

In 1860, Congress authorized the submission of bids to construct a telegraph line from Missouri to the Pacific. The successful bidder was to receive a ten-year contract

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<sup>90/</sup> See State, Trenton & N.B. Turnpike Co. v. American & European Com. News Co., 43 N.J.L. 381 (1881), and authorities cited. See also notes 170-84 infra and H. Schreiber, "The Road to Munn; Eminent Domain and the Concept of Public Purpose in the State Courts," in D. Fleming & B. Bailyn (ed.), Law in American History 329 (1971).

providing for an annual monetary stipend, a grant of public lands, and a right-of-way over other public lands. The Government was to receive a priority in the use of the line, but the interests of the general public also were recognized. It was provided:<sup>91/</sup>

"That the [line] shall be open to the use of all citizens . . . during the term of the . . . contract, on payment of the regular charges for the transmission of dispatches: [and] such charges shall not exceed three dollars for a single dispatch of ten words, with the usual proportionate deductions upon dispatches of greater length . . .

"That messages received from any individual, company, or corporation, or from any telegraph lines connecting with this line at either of its termini, shall be impartially transmitted in the order of their reception . . . ."

The legislation further provided that it was not to confer "any exclusive right to construct a telegraph to the Pacific, or debar the government of the United States from granting, from time to time, similar franchises and privileges to other parties." The legislative debates preceding enactment manifested Congressional concern about the monopoly achieved by Western Union in substantial segments of the telegraph industry and the potential for augmentation of that monopoly under this legislation.<sup>92/</sup>

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<sup>91/</sup> Act of June 16, 1860, 12 Stat. 41.

<sup>92/</sup> Cong. Globe, 36th Cong., 1st Sess. 1692-97, 2249-52, 2279-81, 3032 (1860).

Similar concerns were manifested by Congress in subsequent legislation. In the Pacific Railroad Act of 1862, provision was made for the construction of telegraph as well as railroad lines to the Pacific, again with provision for government support and government priority. There was a further provision authorizing a Congressionally directed rate reduction if realized earnings of railroad and telegraph operations exceeded ten percent of cost.<sup>93/</sup> The legislation was influenced in part by the monopoly characteristics of the telegraph industry.<sup>94/</sup>

In 1864, this legislation was amended to provide:

"That the several railroad companies . . . are hereby required to operate and use [their] roads and telegraph for all purposes of communication, travel, and transportation, so far as the public and the Government are concerned, as one continuous line; and in such operation and use to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others, and it shall not be lawful for [telegraph proprietors] authorized by this act . . . to refuse, or fail to convey for all persons requiring the transmission of news or messages of like character . . . ." <sup>95/</sup>

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<sup>93/</sup> Act of July 1, 1862, 12 Stat. 489.

<sup>94/</sup> Cong. Globe, 37th Cong., 2d Sess. 2760-61 (1862).

<sup>95/</sup> Act of July 2, 1864, 13 Stat. 356.

The Telegraph Lines Act of 1866 provided that any telegraph company

"shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States . . . , and over, under, or across the navigable streams or waters of the United States."

Provision was made for priority for government transmissions and the Postmaster-General was empowered to fix the rates on such messages.<sup>96/</sup> Again the Congress was motivated by hostility toward the monopoly position of Western Union in the telegraph industry.<sup>97/</sup>

Finally, in the Telegraph Lines Act of 1888, all telegraph and railroad companies that had received any form of government support, and were required in their enabling legislation to construct, maintain or operate telegraph lines, were directed to maintain and operate, through their own personnel, telegraph lines "for railroad, Governmental, commercial, and all other purposes, . . . and exercise by themselves alone all the telegraph franchises conferred upon them and obligations assumed by them under the acts making the

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<sup>96/</sup> Act of July 24, 1866, 14 Stat. 221.

<sup>97/</sup> Cong. Globe, 39th Cong., 1st Sess. 3427-29, 3480-86, 3489, 3744-46 (1866).

grants as aforesaid." Provision also was made for the interconnection of telegraph lines

"for the prompt and convenient interchange of telegraph business between said companies; and such railroad and telegraph companies . . . shall so operate their respective telegraph lines as to afford equal facilities to all, without discrimination in favor of or against any person, company, or corporation whatever, and shall receive, deliver, and exchange business with connecting telegraph lines on equal terms, and affording equal facilities, and without discrimination for or against any such lines; and such exchange of business shall be on terms just and equitable."

The ICC was authorized to enforce these requirements. The Attorney-General was directed to challenge any contracts purporting to grant exclusive rights-of-way to telegraph companies on railroad properties.<sup>98/</sup> The monopoly position of Western Union was the dominant concern of Congress.<sup>99/</sup>

#### IV. THE ADVENT OF THE TELEPHONE AND FURTHER STATE LEGISLATION

The enactment of state legislation continued unabated after the introduction of the telephone in 1878. There were a number of different patterns. In virtually all states, existing telegraph legislation was made applicable to telephone

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<sup>98/</sup> Act of Aug. 7, 1888, 25 Stat. 382.

<sup>99/</sup> 19 Cong. Rec. 1100-09, 1294-1305, 1703-15 (1888).



companies, either by statutory revision or judicial interpretation. Thus telephone companies generally were able to incorporate under a general statute, to use public thoroughfares, and to exercise the power of eminent domain. They also were subject to the statutory responsibilities of telegraph companies, although some of these -- such as the duty to transmit in order -- were not relevant to most telephone operations.

A spate of new legislation emerged to make applicable to telephone companies regulations analogous to those in effect for telegraph companies. In some instances the new legislation imposed duties on telegraph and telephone alike. The telegraph industry also attracted additional legislative attention wholly apart from the telephone. In some instances the legislation simply imported old statutory formulations into new states. In others, new statutory approaches were adopted. Finally, there were a number of state constitutional provisions adopted pertaining to the telecommunications industry.

The legislative and constitutional developments during this period placed great emphasis on regulation, but the general pattern was unchanged. The legislatures continued to be concerned about abuses of monopoly position and imposed the obligation of non-discriminatory access as the principal remedy.

### A. State Responses to the Telephone

In 1881, New Hampshire made its existing telegraph legislation applicable to telephone and added the requirement that telephone and telegraph systems "shall open and maintain, at some convenient point or points, offices or places where [users may communicate] to all points reached by such line or its connections, on payment of a reasonable fee for such use."<sup>100/</sup> The 1891 codification provided for offices at points "as will reasonably accommodate users"; empowered the judiciary to require the opening of offices "if the public convenience requires it"; and required telephone and telegraph companies to "reasonably accommodate [users] without discrimination and at reasonable rates."<sup>101/</sup>

In 1882, Wisconsin enacted a comprehensive prohibition against discrimination by telephone companies. They were required

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<sup>100/</sup> Act of Aug. 9, 1881, N.H. Laws, c. 54, p. 472. The prior law consisted of a limitation on certain aspects of telegraph pole construction, Act of July 18, 1877, N.H. Laws, c. 50, p. 37, and a requirement that telegraph companies maintain offices at railroad passenger stations in towns of 1500 or more population, Act of July 18, 1879, N.H. Laws, c. 40, p. 356. The 1881 legislation provided for use of public streets, subject to local regulation, and damages to adversely affected property owners.

<sup>101/</sup> N.H. Public Stat. c. 81 (1891). The provisions were amended in minor respects in N.H. Laws, 1897, c. 16, p. 17; c. 81, p. 78; c. 92, p. 88. An enactment in 1909 established standards for seasonal telephone rates. Act of Apr. 9, 1909, N.H. Laws, c. 141, p. 511.

"to receive and transmit messages from and for any other company, person or persons, upon payment or tender of the usual or customary charges therefor; and upon payment of the usual or customary rental sum, . . . to furnish, without unreasonable delay, without discrimination and without any further or additional charge to the [customer,] including all telegraph companies, a telephone or telephones with all the necessary fixtures, as well as connection with the central office or telephone exchange if desired, and shall connect the telephone of such [customer] with the telephone of any other . . . having a connection with the same, or a connecting exchange or central office, whenever requested to do so, without regard to the character of the messages to be transmitted, provided they are not [obscene] or profane . . . ."102/

The prevention of discrimination was the dominant theme of similar legislation enacted in Michigan (1883),<sup>103/</sup> Arkansas (1885),<sup>104/</sup> Indiana (1885),<sup>105/</sup> Maine (1885),<sup>106/</sup> Massachusetts (1885),<sup>107/</sup> Tennessee (1885),<sup>108/</sup> Vermont

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<sup>102/</sup> Act of Mar. 23, 1882, Wis. Laws, c. 196, p. 647. Minor amendments were made by Act of Apr. 17, 1893, c. 236, p. 289.

<sup>103/</sup> Act of May 3, 1883, Mich. Laws, No. 72, p. 56. Minor amendments were made by Act of June 2, 1909, Mich. Laws, No. 301, p. 734.

<sup>104/</sup> Act of Mar. 31, 1885, Ark. Laws, No. 52, p. 176, §§ 10, 11. Minor amendments were made by Act of Feb. 25, 1913, Ark. Laws, No. 95, p. 346.

<sup>105/</sup> Act of Apr. 8, 1885, Ind. Laws, c. 48, p. 151.

<sup>106/</sup> Act of Mar. 6, 1885, Me. Laws, c. 378, p. 318. The major emphasis was on requiring interconnection among lines, but discrimination among subscribers was also prohibited.

<sup>107/</sup> Act of May 27, 1885, Mass. Laws, c. 268, p. 703.

(1888),<sup>109/</sup> Washington (1890),<sup>110/</sup> Maryland (1892),<sup>111/</sup> Iowa (1897),<sup>112/</sup> Texas (1907),<sup>113/</sup> and Oklahoma (1908).<sup>114/</sup>

Discrimination against connecting lines was prohibited in Connecticut (1889),<sup>115/</sup> Kentucky (1891),<sup>116/</sup> and New York.<sup>117/</sup>

Undue discrimination among cities of different size was prohibited in South Carolina (1898)<sup>118/</sup> and Wisconsin (1905).<sup>119/</sup>

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<sup>108/</sup> Act of Mar. 25, 1885, Tenn. Laws, c. 66, p. 120.

<sup>109/</sup> Act of Nov. 26, 1888, Vt. Laws, No. 124, p. 132. Minor amendments were made by Act of Nov. 22, 1892, Vt. Laws, No. 73, p. 73.

<sup>110/</sup> Act of Mar. 28, 1890, Wash. Laws, 1889-90, p. 292, § 2.

<sup>111/</sup> Act of Apr. 7, 1892, Md. Laws, c. 387, p. 535, supplemented by Act of Apr. 3, 1894, Md. Laws, c. 207, p. 260.

<sup>112/</sup> Iowa Code § 2161 (1897).

<sup>113/</sup> Act of May 16, 1907, Texas Laws, c. 12, p. 462; Act of Mar. 26, 1907, Texas Laws, p. 93. The statutes applied to telegraph as well as telephone.

<sup>114/</sup> Act of May 26, 1908, Okla. Laws, 1907-08, c. 13, p. 198. Use of public roads and the power of eminent domain were authorized in Okla. Terr. Stat. § 1054 (1893). See also Okla. Rev. Laws § 1445 (1910).

<sup>115/</sup> Act of May 27, 1889, Conn. Laws, c. 160, p. 57 (telephone discrimination against telegraph companies prohibited).

<sup>116/</sup> Ky. Const. § 199 (1891), supplemented by Act of Mar. 19, 1912, Ky. Laws, c. 143, p. 649. The Act of Mar. 15, 1912, Ky. Laws, c. 99, p. 285, regulated telephone company mergers.

<sup>117/</sup> This was one effect of the Transportation Corporations Laws, Act of June 9, 1900, N.Y. Laws, c. 566, p. 1136, which required telephone and telegraph companies to "receive dispatches from and for other telephone or telegraph lines" as well as from and for individuals.

<sup>118/</sup> Act of Feb. 21, 1898, S.C. Laws, No. 485, p. 779. Use of public roads and the power of eminent domain were authorized

Telephone rates were limited by statute in Arkansas (1885),<sup>120/</sup> Indiana (1885),<sup>121/</sup> Maryland (1892),<sup>122/</sup> and the District of Columbia (1898).<sup>123/</sup> The authority to regulate telephone rates was delegated to municipalities in Nebraska (1887),<sup>124/</sup> Iowa (1888),<sup>125/</sup> Kansas (1903),<sup>126/</sup> and Missouri (1907),<sup>127/</sup> and to the courts in Texas (1905).<sup>128/</sup>

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[Footnote continued from preceding page]

by Act of Feb. 23, 1899, S.C. Laws, No. 40, p. 61. See also Act of Feb. 19, 1880, S.C. Laws, No. 204, p. 236.

<sup>119/</sup> Act of June 17, 1905, Wis. Laws, c. 389, p. 628.

<sup>120/</sup> Act of Mar. 31, 1885, Ark. Laws, No. 130, p. 208.

<sup>121/</sup> Act of Apr. 13, 1885, Ind. Laws, c. 92, p. 227, repealed, Act of Feb. 27, 1889, Ind. Laws, c. 34, p. 49.

<sup>122/</sup> Act of Apr. 7, 1892, Md. Laws, c. 387, p. 535, as amended by Act of Apr. 2, 1896, c. 139, p. 229.

A limited rate restriction was imposed by Delaware in 1913. Act of Mar. 26, 1913, 27 Del. Laws, c. 289, p. 826. Use of public roads by telephone and telegraph was authorized by Act of May 10, 1899, 21 Del. Laws, c. 273, p. 487, and the power of eminent domain was conferred by Act of March 19, 1913, 27 Del. Laws, c. 189, p. 470.

<sup>123/</sup> 30 Stat. 525, 538 (1898).

<sup>124/</sup> Act of Mar. 30, 1887, Neb. Laws, c. 10, p. 103.

<sup>125/</sup> Act of Apr. 10, 1888, Iowa Laws, c. 16, p. 19.

<sup>126/</sup> Act of Mar. 13, 1903, Kans. Laws, c. 122, p. 178.

<sup>127/</sup> Act of Mar. 8, 1907, Mo. Laws, p. 119.

<sup>128/</sup> Act of Apr. 17, 1905, Texas Laws, c. 145, p. 348. See also Act of Apr. 7, 1913 c. 147, p. 307 (municipal regulation of telephone rates authorized in home rule cities.)

Limitations on the establishment of competitive telephone service were enacted in Rhode Island (1891),<sup>129/</sup> Maine (1895),<sup>130/</sup> and Connecticut (1899).<sup>131/</sup> These foreshadowed subsequent legislation that would establish monopoly as the de jure as well as the de facto basis for telephone and telegraph service.<sup>132/</sup>

#### B. Additional Telegraph Legislation

In 1883, Nebraska enacted a comprehensive statute prohibiting discrimination by telegraph companies (and also by press associations). In addition to the usual provisions requiring equal treatment for those similarly situated, the statute prohibited greater charges for short distances than for long distances.<sup>133/</sup> Florida in 1885 enacted a statutory ceiling on telegraph and cable charges, the limit varying with the number of words, distance, and other factors.<sup>134/</sup> Also in

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<sup>129/</sup> Act of May 29, 1891, R.I. Laws, c. 975, p. 1 (authorizing towns to grant exclusive franchises). See also R.I. Pub. Stat. c. 38, § 20 (1882).

<sup>130/</sup> Act of Mar. 18, 1895, Me. Laws, c. 103, p. 114, § 3, repealed, Act of Mar. 24, 1903, Me. Laws, c. 141, p. 108.

<sup>131/</sup> Act of Jan. 7, 1899, Conn. Laws, c. 158, p. 1078.

<sup>132/</sup> See W.K. Jones, Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920, 79 Colum. L. Rev. 426, 450-51, 476-82 (1979).

<sup>133/</sup> Act of Feb. 24, 1883, Neb. Laws, c. 80, p. 321. Use of public roads was authorized by Act of Mar. 30, 1887, Neb. Laws, c. 87, p. 634.

<sup>134/</sup> Act of Feb. 11, 1885, Fla. Laws, c. 3609, p. 52, as modified by Fla. Rev. Stat. § 2258 (1892).

1885, Minnesota adopted a statute regulating telegraph lines, declaring them "to be common carriers, and as such [required to] serve the public without discrimination or preference, at reasonable rates of compensation." Exemptions from liability were declared void; delivery of telegrams within city limits was mandated; and transmission of messages was required to be in the order received and within a reasonable time.<sup>135/</sup>

Mississippi in 1886 imposed a penalty on a telegraph company if it should "neglect, fail or refuse to transmit and deliver, within a reasonable time, without good and sufficient excuse," any telegraph message.<sup>136/</sup> In 1887, Georgia imposed on telegraph companies, "telegraphing for the public," a duty to transmit and deliver messages "with impartiality and good faith, and with due diligence," and to make deliveries to persons within one mile of the station.<sup>137/</sup> The same year Idaho, while still a territory, enacted a conventional telegraph law, authorizing incorporation and use of public and

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<sup>135/</sup> Act of Mar. 7, 1885, Minn. Laws, c. 208, p. 278. See also Act of Apr. 19, 1893, Minn. Laws, c. 74, p. 189; Minn. Penal Code § 482 (1886).

<sup>136/</sup> Act of Mar. 18, 1886, Miss. Laws, c. 34, p. 91.

<sup>137/</sup> Act of Oct. 22, 1887, Ga. Laws, No. 365, p. 111, amended in minor respects, Act of Dec. 20, 1892, Ga. Laws, No. 93, p. 96, repealed, Act of Dec. 17, 1894, Ga. Laws, No. 96, p. 79. A more comprehensive statute, following conventional lines, was enacted as Act of Nov. 12, 1889, Ga. Laws, No. 672, p. 175.

private lands and imposing a penalty for willful refusal or neglect to transmit or deliver telegrams and for willful postponement of telegraph messages.<sup>138/</sup>

North Carolina in 1889 made it unlawful for telegraph operations to refuse or neglect "duly to transmit or deliver" telegraph messages.<sup>139/</sup> In 1893, the Oklahoma Territory enacted a statute governing common carriers of messages, with some provisions directed to telegraph companies in particular, patterned after the legislation of the Dakota Territory.<sup>140/</sup> Montana in 1895 enacted comprehensive legislation applicable to telephone and telegraph. The terms of the legislation were principally relevant to telegraph operations, concerning deliveries, order of transmission, errors, and relations among connecting lines.<sup>141/</sup>

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<sup>138/</sup> Idaho Terr. Stat. § 2580, 2582, 2700, 7205 (1887) (also conferring right to use public roads and power of eminent domain). A minor amendment was made by Act of Mar. 14, 1907, Idaho Laws, p. 472, and a significant amendment by Act of Mar. 11, 1911, Idaho Laws, c. 222, p. 704. The latter directed physical interconnection and transfer of messages between and among telegraph and telephone companies.

<sup>139/</sup> Act of Jan. 31, 1889, N.C. Laws, c. 41, p. 61.

<sup>140/</sup> Okla. Terr. Stat. §§ 484-515 (1893). See also Okla. Rev. Laws. §§ 786-97, 855-59 (1910). On the Dakota Territory legislation see note 82 supra.

<sup>141/</sup> Mont. Civil Code §§ 1001, 2860, 2861, 2930 (1895). See also Mont. Penal Code § 1150 (1895).



The same year South Dakota provided for incorporation of telegraph companies, their use of public roads and their exercise of the power of eminent domain. Such companies were required to exercise "utmost care and diligence in the transmission and delivery of messages." Immediate transmission of messages was required if practicable; if not, transmission generally was to be in the order messages were received.<sup>142/</sup> Arkansas in 1897 passed "An act to prohibit extortion by agents of . . . Telegraph Companies . . .," requiring that telegraph companies post their regular charges and adhere to them.<sup>143/</sup> In 1899, Kansas enacted complex legislation imposing statutory limits on telegraph charges.<sup>144/</sup>

Virginia in 1904 enacted substantial new legislation, applicable to telegraph and telephone, that largely followed earlier patterns but dealt with problems of discrimination and service in greater detail and in a manner bearing principally on telegraph operations.<sup>145/</sup> In 1907, Maine required telegraph

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<sup>142/</sup> Act of Mar. 13, 1895, S.D. Laws, 1895, c. 41, p. 43.

<sup>143/</sup> Act of Mar. 16, 1897, Ark. Laws, No. 53, p. 72. See also Ark. Laws, 1911, No. 332, p. 965, and No. 384, p. 1064, requiring Western Union to keep operators on duty at specific places for specified times.

<sup>144/</sup> Act of Jan. 6, 1899, Kans. Laws, 1898, c. 38, p. 117. The legislation provided for a court of visitation to further regulate telegraph service and may be viewed as a precursor to commission regulation of telecommunications. See also Act of Mar. 13, 1893, Kans. Laws, c. 152, p. 236, and Act of Mar. 2, 1903, c. 514, p. 759, regulating telegraph office availability and hours.

<sup>145/</sup> Act of Jan. 18, 1904, Va. Laws, 1902-04, c. 609, p. 968, ch. VIII, amended, Act of Mar. 17, 1906, c. 310, p. 545.